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CASE NOTE: CAN WE NOW TELL WHAT "DIRECT PARTICIPATION IN HOSTILITIES" IS?

HCJ 769/02 *THE PUBLIC COMMITTEE AGAINST TORTURE IN ISRAEL V. THE GOVERNMENT OF ISRAEL*

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ABSTRACT

This paper presents a critique of the Israeli Supreme Court's decision concerning the question of the legality of the policy of targeted killings carried out by the Israeli Army in the occupied territories. This policy is intended to frustrate terrorist acts which Israel has been confronting since September 2000. In its specific aspect, the paper is directed at some of the Court's substantive determinations claiming that the Court either erred in its statements or was not clear with respect to issues such as the nature of the conflict between Israel and the Palestinians, the third category of unlawful combatants option, and the different status of the West Bank and the Gaza Strip. On a more general level, the main argument presented in the critique is that the Court's reasoning for deciding the questions of participating directly in hostilities and of the principle of proportionality is non-analytical in nature. In our mind this non-analytical approach prevents the emergence of a general definition of direct participation in hostilities in international humanitarian law, and moreover, it undermines the Court's ability to fulfill its own intended aim, which was to guide the administrative branch in making practical decisions in specific cases in which the policy of targeted killings is considered. The paper sets forth a proposal for general guidelines to fill in the lacunae in the decision.

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[*] HCJ 769/02 The Public Committee Against Torture in Israel *v.* the Government of Israel [December 14, 2006] (not yet published)[hereinafter the Court's decision or the Petition]. The English translation is *available at* http://209.85.135.104/search?q=cache:wT1QJidj5iUJ:elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf+HCJ+769/02+The+Public+Committee+Against+Torture+in+Israel+v.+The+Government+of+Israel&hl=iw&ct=clnk&cd=1 (last visited February 20, 2007).

[**] Lecturer, Sha'arei Mishpat College. Special thanks are due to Prof. Mordechai Kremnitzer and Dr. Yuval Shany with whom I have previously worked and discussed the issues in this paper. In addition, I thank the members of the International Law Forum at the Hebrew University and two anonymous referees whose insightful remarks were of great value to me in writing this paper.

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I. Introduction

In December 2006, five years after the petition[1] was filed before the Israeli Supreme Court (hereinafter the Court), the Court rendered a decision on a question of major importance: Is the policy of preventative strikes, which cause the death of persons who participate in hostilities and sometimes of innocent bystanders,[2] legal according to both international and Israeli law? Since November 2000, Israel has been targeting suspected terrorists in the occupied territories of Judea and Samaria and in the Gaza Strip. This policy of targeted killings is one of the means that the Israeli Army uses in order to frustrate terrorist activities being carried out against Israelis in the course of the second *Intifada.* The second *Intifada,* which started in September 2000,[3] and unfortunately continues to date, began an era of difficult and bloody struggle between Israel and the Palestinian Authority, claiming hundreds of losses on both sides. Israel was, and is still, faced with terrorist acts, many of which are committed by suicide bombers, that have left more than one thousand people dead and many more injured.[4] The Palestinians have suffered almost four thousand deaths and even a larger number of casualties due to Israel's armed activities in the territories and in Gaza.[5] According to the data presented by the petitioners, since the commencement of the targeted killings policy, and up until the end of 2005, close to three hundred members of terrorist organizations have been killed in such attacks. More than thirty targeted killing attempts have failed. Approximately 150 civilians who were in the area in which targeted killing

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[1] HCJ 769/02 The Public Committee Against Torture in Israel v. the Government of Israel [December 14, 2006] (not yet published)[hereinafter the Court's decision or the Petition]. The English translation is *available at* http://209.85.135.104/search?q=cache:wT1QJidj5iUJ:elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf+HCJ+769/02+The+Public+Committee+Against+Torture+in+Israel+v.+The+Government+of+Israel&hl=iw&ct=clnk&cd=1 (last visited February 20, 2007).

[2] We shall call this policy "targeted killings."

[3] The Court defines February 2000 as the beginning of the *Intifada*; however, it is commonly agreed that the *Intifada* began at the end of September 2000.

[4] These data refer to the period between September 29, 2000 and May 1, 2006. *See* http://www.mfa.gov.il/mfa/terrorism-%20obstacle%20to%20peace/palestinian%20terror%20since%202000/ (last visited February 20, 2007).

[5] These data refer to the period between September 29, 2000 and December 31, 2006. *See* http://www.btselem.org/Hebrew/Statistics/Casualties.asp (last visited February 20, 2007).

operations were carried out have been killed during those acts. Hundreds of others have been wounded. This data forms the factual basis of the petition.

The decision on the controversial issue of the legality of targeted killings arises in several problematic contexts and presents questions such as: What is the legal regime that governs this practice? Should it be referred to in the context of a peace-like situation or is it a military means used in the course of an armed conflict? If it should be regarded as being in the context of an armed conflict, is this practice compatible with the principles of humanitarian law? This policy also deals with more general issues such as the morality of the practice and the conflict that it creates between the most fundamental values of a democratic society: the right to life as opposed to the right (and duty) of a state to defend itself. As such, and even though the decision is of a national court, it will possibly be referred to in international forums should they discuss related questions,[6] and therefore, the decision may

[6] It is important to note that international non-judicial forums have dealt with this issue. *See, e.g.,* the report of the Human Rights Inquiry Commission to the U.N. Commission on Human Rights: John Dugard, Kamal Hossain & Richard Falk, *Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine*, E/CN.4/2001/121 (16 Mar. 2001), *also available at* http://www.ucihl.org/communication/Right_to_Life_Meeting_Report.pdf (last visited February 20, 2007). This commission, which was set up to investigate the events at the beginning of the second *Intifada* and the first occurrences of targeted killings, condemns this policy. It claims that Israel neither proved that the targeted persons were participating directly in hostilities when targeted, nor did it present evidence of the military nature of the acts carried out by the targeted persons. In conclusion, it refers to it as a policy of "extra-judicial executions."' *See id.* at paras. 53-64. Note also the reports of conferences of experts such as: Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation, Organised by The University Centre for International Humanitarian Law, Geneva, Convened at International Conference Centre, Geneva, 1 – 2 September 2005 (hereinafter "the Geneva Expert Meeting"); International Committee of the Red Cross, *Direct Participation in Hostilities under International Humanitarian Law*,(September 2003), *also available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct%20participation%20in%20hostilities-Sept%202003.pdf (last visited February 20, 2007); and Direct Participation in Hostilities under International Humanitarian Law, Second Expert Meeting, The Hague, 25-26 October 2004, Co-organized by the ICRC and the TMC Asser Institute [hereinafter the ICRC Second Expert Meeting]. The reports analyze the question of direct participation in hostilities and attempt at formulating an agreed-upon definition of this term. A third report of the ICRC's expert meetings, which is forthcoming, is intended to represent the final conclusions of these experts. In addition, related issues such as the right to life, self-defense, proportionality, and military necessity were dealt with by judicial bodies such as the ICJ and the ECTHR. *See, e.g.,* McCann v. the United Kingdom, 21 Eur. Ct. H.R. (Ser. B) 97 (1996), in which the Court discusses the means which may be employed against terrorism in light of the analysis of the constraints put on the right to life by the right of self-defense; Ergi v. Turkey, Application No. 23818/93, Judgment of 28 July, 1998, where the ECTHR determines the lawfulness of the measures taken by the Turkish security forces in the Kurdish areas. The Court uses both IHL discourse and HRL norms in order to decide this question. It states that Turkey did not correctly apply the principle of proportionality and "did not take all feasible precautions… minimizing incidental loss of civilian life." *See id.* at para. 79; The ICJ's *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* (July 8, 1996), *available at* http://www.icj-cij.org/icjwww/icases/iunan/iunanframe.htm (last visited February 20, 2007), and *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (9 July 2004) *available at* http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm (last visited February 20, 2007), where the Court accepts the

be expected to influence future rulings raising similar questions in the area of international humanitarian law.

The bottom line of the decision is that targeted killings may sometimes be authorized, yet their use is to be restricted by certain conditions. The main part of the decision is written by former President of the Supreme Court Barak, while Deputy President Rivlin and present President of the Supreme Court Beinisch, who concur with President Barak's conclusion, illuminate some of the themes discussed in the decision from additional perspectives. The following paragraphs summarize the decision and its main statements.

Consistent with its earlier decisions stating that the second *Intifada* is an armed conflict between Israel and the Palestinians,[7] the Court places the policy of targeted killings in the legal regime of an armed conflict. More specifically, the Court characterizes the conflict as an *international* armed conflict. Hence, it assumes that international humanitarian law or the laws of war in general, and specifically the laws of international armed conflict, apply. It adds that alongside the international law that deals with armed conflicts, fundamental principles of Israeli public law may apply.

In light of the above, the Court defines the status of persons who participate directly in hostilities, discusses the question of whether they should be regarded as legitimate targets, and determines the conditions under which killing them is authorized. The Court refers to the persons who take a direct part in hostilities as civilians; yet, not as civilians who refrain from taking part in militant activities, but rather as civilians who perform direct hostile acts. The "basic principle," in the words of the Court, that governs the level of protection accorded to those civilians in the battlefield states that civilians taking a direct part in hostilities are not protected from attack upon them at such time as they are doing so.[8] The Court then discusses and defines three elements of this principle, *i.e.*, "taking part in hostilities,"[9] "taking a *direct* part,"[10] and the duration of time in which one may be considered a direct participant.[11]

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application of human rights law (HRL) discourse to cases of an international humanitarian law (IHL) nature, even though it considers IHL to be the *lex specialis* in these cases.

[7] Paragraphs 16-21 of the Court's decision, *supra* note 1, former President Barak's ruling. Unless otherwise mentioned, all the citations from the Court's decision are taken from President Barak's ruling.

[8] *Id.* at para. 31.

[9] *Id.* at para. 33.

[10] *Id. at* paras. 34-37.

[11] *Id.* at paras. 38-40.

The Court's analysis of these elements is casuistic in nature, as it concludes that customary international law has not yet arrived at a definitive conclusion regarding these issues. Therefore, the Court suggests a case-by-case evaluation in order to determine what direct participation in hostilities is and describes a spectrum of activities that serve as examples of direct and indirect participation.[12] Next, the Court refers to the time element by distinguishing between two extreme situations, the first of them being complete devotion to a terrorist organization and the second being a person who performs a unique action or sporadic ones on behalf of the organization and then detaches herself from this activity.[13]

The authorization of targeted killings of persons who participate directly in hostilities is then restricted by four principles. First, well-based information is needed before categorizing a civilian as falling into one of the discussed categories. Second, the killing is authorized only when a less harmful means cannot be employed. Third, after an attack, a thorough and independent investigation regarding the precision of the identification of the target and the circumstances of the attack upon her is to be performed. Last, if the attack also results in harm to innocent civilians nearby, that collateral damage must withstand the proportionality test.[14]

The proportionality test is the last substantive issue with which the Court deals with respect to the limitations put on the policy of targeted killings. With regard to harming bystanders who do not participate directly in hostilities, the Court accepts what it calls: "proportionality *stricto senso,*"[15] i.e., the principle of proportionality applied in customary international humanitarian law. This principle requires that there be a proper proportional relationship between the military objective and the civilian damage. Therefore, the attack upon civilians not participating in hostilities is not permitted if the collateral damage caused to them is not proportional to the military advantage (in protecting combatants and civilians).[16] The Court concludes its discussion of the proportionality principle by

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[12] *Id.* at para. 35.
[13] *Id.* at para. 39.
[14] *Id.* at para. 40.
[15] *Id.* at para.44.
[16] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Adopted June 8, 1977), 1125 U.N.T.S 3 *reprinted* in 16 I.LM. 1391 (1977) (hereinafter AP I articles 51(5)(b), 57.

acknowledging that a case-by-case examination is required in order to create the balance demanded by the principle.[17]

The last portions of the decision are devoted to the questions of justiciability and the scope of judicial review. Referring to the question of non-justiciability, the Court determines the case to be both normatively and institutionally justiciable. Focusing on institutional justiciability, the Court states that the case fulfills four conditions which govern the justiciability of cases, *i.e.*, the case involves a possible infringement of human rights; the questions which it raises are of a dominantly legal character; the types of questions examined by this Court have also been decided by international courts, and the case requires an *ex post* and objective examination, which is best implemented by a judicial review.[18]

With reference to the scope of judicial review of the military commander's decision, the Court states that the question of the fulfillment of the conditions determined in customary international law for performing military operations is a legal question, the expertise regarding which is the Court's. However, the intensity of this review in this case is low since it is inevitably performed after the fact and because it is only a secondary review to the principal one made by the examination committee, a committee which the Court demands be set up in accordance with the rules of international law.[19]

Both Rivlin and Beinisch wrote concurring decisions, in which they chose to focus on and emphasize some of the aspects of the Court's main decision, written by Barak.[20] Rivlin stresses the question of the possibility of referring to persons participating directly in hostilities as "unlawful combatants," accordingly reality has created a group with the status of unlawful combatants. He notes that Barak's "dynamic interpretation"[21] adheres to this conclusion in practice and while Barak technically refers to the terrorists as civilians, they should instead, in Rivlin's opinion, be related to as international-law-breaking civilians, or "uncivilized civilians." This interpretation, he claims, overcomes the limitations of a black letter reading of the laws of war.[22]

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[17] The Court's decision, *supra* note 1, at para. 46.
[18] *Id.* at paras. 47-54.
[19] *Id.* at paras. 58-59.
[20] The opinions of Deputy President Rivlin and President Beinisch are not summarized here but rather those portions of the opinions that emphasize different aspects of the case than those discussed in the main decision are presented.
[21] The Court's decision, *supra* note 1, at para. 28.
[22] *Id.* at para. 2 of Rivlin's decision.

In her concurring opinion, Beinisch refers to one of the criteria that Barak stated that limits the policy of targeted killings, *i.e.*, the demand for well-based information about the identity and the role of the person suspected of taking a direct part in hostilities. Beinisch determines that this information refers to the risk that the terrorist poses to human life, but clarifies that in estimating the risk, the extent of the probability of life-threatening hostilities is to be taken into account, and that a minor possibility is insufficient; a significant probability of the existence of such risk is required.[23]

This note concentrates on the core of the decision, which is the question of the legality of targeted killings in terms of international and domestic law and discusses only indirectly the issues of justiciability and the scope of judicial review, insofar as these issues relate to and affect the Court's reasoning and analysis of the more fundamental themes of the decision.

The critique is both specific and general in nature. In its specific aspect, it is directed at some of the Court's substantive determinations claiming that the Court either erred in its statements or was not clear with respect to issues such as the nature of the conflict between Israel and the Palestinians, the third category of unlawful combatants option, and the different status of the West Bank and the Gaza Strip. On a more general level, the main argument presented in the critique is that the Court's reasoning for deciding the questions of participating directly in hostilities and of the principle of proportionality is non-analytical in nature. This non-analytical approach prevents the emergence of a general definition of direct participation in hostilities, and moreover, it undermines the Court's ability to fulfill its own intended aim, which was to guide the administrative branch in making practical decisions in specific cases in which the policy of targeted killings is considered.

Section B discusses some of the Court's substantive determinations that establish the theoretical background for answering the question of direct participation in hostilities. While their contribution to international law discourse must be appreciated, this section points out some of the Court's underlying misconceptions. Section C concentrates on the Court's analysis of the definition of direct participation in hostilities. The general claim presented in this section is both that the Court has overlooked some fundamental issues and questions and that its reasoning in answering those it does examine is of a non-analytical nature. In so doing, the Court renders the guidelines suggested by it for answering the

[23] *Id.* at Beinisch's ruling.

question of what is a legitimate target completely ineffective in instructing the executive bodies when making practical decisions. Section D sets forth a proposal for general guidelines to fill in the *lacunae* in the decision. It is far beyond the scope of this note to suggest a comprehensive solution to the questions, which, it appears, were left open by the Court, or to set forth a comprehensive framework for deciding those questions. Nevertheless, the proposed guidelines could create a theoretical basis for resolving the open questions. Section E constitutes the conclusion of the critique.

II. A Critique of the Substantive Determinations

One of the most important questions before the Court was the nature of the current conflict, during the course of which Israel has implemented a policy of targeted killings. Consistent with its earlier decisions, the Court determines that the second *Intifada* is an armed conflict between Israel and the Palestinians.[24] This determination places the question of the legality of targeted killings in a specific context of international humanitarian law or the laws of war. It clarifies that the killings are not executions carried out as isolated incidents but rather a military means which is used against those who participate directly in hostilities.

The Court seems to be correct in characterizing the second *Intifada* as an armed conflict. This description is supported by the ICTY's ruling which stated that an armed conflict exists whenever there is resort to armed force between states, or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state.[25] It is also supported by the Inter-American Commission on Human Rights, which describes the armed conflict between a state and a terrorist organization and determines that under certain circumstances, terrorist or counter-terrorist actions may involve organized violence of such intensity as to give rise to an armed conflict.[26]

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[24] *Id.* at paras. 16-21.

[25] *See* Prosecutor v. Tadic, IT-94-1 ,ICTY, App.C., (October 2, 1995).

[26] *See* Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.L/-V/II.116 Doc.5 rev.1 corr., (October 22, 2002). This view, which has gained support after the events of 9/11, is echoed in the writings of numerous scholars that were published prior to these events. These scholars claim that recurrent terrorist acts constitute a relatively high level of armed attack. Some examples are: Yehuda Blum, *The Beirut Raid and the International Double Standard; A reply to Professor Richard A. Falk,* 64 AM. J. INT'L. L., 80, 136 (1970); James P. Rawls, *Military Responses to Terrorism: Substantive and Procedural Constrains in International Law*, *in* AMERICAN SOCIETY OF INTERNATIONAL LAW, PROCEEDINGS OF THE 81TH ANNUAL MEETING (Malloy

Nevertheless, it is worth mentioning the opposite theory, which suggests that the acts of terrorist organizations do not amount to an armed conflict between a state and an organization and should, therefore, be regarded as criminal acts and be subject to a law enforcement regime.[27] However, this concept of terrorist and counter-terrorist acts is becoming less accepted, especially after the events of 9/11.

Yet, even after rejecting those views according to which the *Intifada* is not an armed conflict, thereby supporting the Court's stance on this issue, some of the Court's misconceptions should be emphasized. Even though the question of the classification of the type of *armed* conflict between Israel and the Palestinians is hardly an open and shut case, it seems that the Court errs both in its definition and especially in its reasoning when it characterizes the nature of this conflict as an *international* one rather than *a non-international* one.[28] Before analyzing the Court's reasoning in deciding this question, some clarification of the distinction between these two types of conflicts is required. The main relevance of the distinction between these two types of armed conflicts is in deciding the set of rules and norms that govern each one of them. International armed conflicts are subject to a much stricter and detailed set of rules, which is comprised of the Geneva Conventions (1949)[29] (hereinafter GC) and the 1977 GC First Additional Protocol (hereinafter AP I)[30] for those states that are parties to this protocol. One important component of this system is the special status of persons participating in international armed conflicts, which is the status of combatants who are entitled to the privileges of prisoners of war (hereinafter POW) when

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Michael P. ed., 1990); Robert J. Beck & Anthony C. Arend, *"Don't Tread on Us": International Law and Forcible State Responses to Terrorism*, 12(2) WIS. INT'L. L .J. 153, 190 (1994).

[27] Leia Nadya Sadat, *Terrorism and the Rule of Law*, 3 WASH. U. GLOBAL STUD. L. REV. 135, 136 (2004); Paust Jordan J., *Symposium: Current Pressures on International Humanitarian Law: War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 YALE J. INT'L. L. 325, 326 (2003). Paust claims that there is no armed conflict between *Al-Qaeda* and the U.S. because *Al-Qaeda* does not even meet the definition of a non-state actor that can be a party to a *non-international* armed conflict, let alone fulfilling the criteria for recognition of an *international* armed conflict."

[28] The Court's decision, *supra* note 1, at para. 21.

[29] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention No. I), (Adopted August 12, 1949), 6 *U.S.T* 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (Geneva Convention No. II), (Adopted August 12, 1949), 6 *U.S.T.* 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention No. III), (Adopted August 12, 1949), 6 *U.S.T.* 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilians Persons in Time of War (Geneva Convention No. IV)(Adopted August 12, 1949), 6 *U.S.T.* 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

[30] AP I. The customary articles of this protocol are also binding on states that are not parties to this protocol.

captured; on the other hand these combatants also serve as legitimate targets as long as they function as such.

Non-international armed conflicts, on the other hand, are subject only to norms which are basically of a humanitarian nature and that were set up to secure the fundamental human rights of the participants in these conflicts. These rules, all of which are considered customary international law, are embedded in Common Article 3 of GC and their Second Additional Protocol (hereinafter AP II).[31] Under this framework, there is no category of combatants but rather only of civilians and civilians who participate directly in hostilities.[32] Consequently, no one is entitled to POW status; however, targeting participants in hostilities is limited to the time in which they indeed participate directly in such hostilities.[33]

As international law and specifically the GC and their Additional Protocols were not tailored for dealing with armed conflicts between states and *terrorist* organizations;[34] the task of deciding the nature of these conflicts is not a simple one and the distinctions are neither clear nor of a purely technical nature. It is obvious that the armed conflict between a state and a terrorist organization has both characteristics of an international conflict and of a non-international one. For example, on the one hand, as in an international conflict, it may cross the borders of one state;[35] on the other hand, it is not a conflict between states but rather a conflict between an organization and a state, which could render it a non-international armed conflict. Nevertheless, it is beyond doubt that Common Article 2 of GC defines an international armed conflict as a conflict between states (High Contracting Parties of the Conventions). This clearly precludes the possibility that a conflict between a state and a non-state actor such as a terrorist organization can be classified as an international conflict. Therefore, claiming that the conflict between Israel and the

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[31] Protocol Additional to the Geneva Conventions of August 12 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 8 July 1977, 1125 U.N.T.S 609, *reprinted in* 16 I.L.M. 1442 (1977).

[32] Common Article 3 of GC, AP II, article 14.

[33] *Id.*

[34] Yet, AP II and Common Article 3 of GC refer to armed conflicts between states and non-state actors. AP I, in addition to defining the rules applicable to international armed conflicts, was designed to cover wars of national liberation as well.

[35] This is generally a characteristic of an international armed conflict, and yet, according to Common Article 3 of GC, it may also characterize a non-international armed conflict. The Article reads: "In the case of an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum the following provisions…" It seems, then, that a non-international armed conflict, as well, may cross the borders of a state, if the organization is located in the territory of one of the High Contracting Parties of the Convention, yet not the Party with which the organization is in struggle.

Palestinians is an international armed conflict demands a much stronger argument than simply saying that it crosses the borders of one state.[36]

Indeed, the Court refers to an armed conflict that occurs, at least partially, in an occupied area. In such a case, its reasoning might be somewhat stronger, since the conflict which resulted in occupation was clearly an international one.[37] Yet, the Court does not raise this argument. Moreover, and as mentioned above, the international armed conflict definition brings the conflict within the scope of a certain set of rules; yet, it seems that the Court is not willing to apply it to the situation at hand. In an international armed conflict, two main categories of persons on the battlefield can be identified: combatants, who are entitled to POW status[38] and civilians or, in occupied territories, protected persons. Since the Court does not refer to members of terrorist organizations as combatants but rather as persons who take direct part in hostilities, and since there does not seem to be a serious argument that any targeted individual would meet the conditions for POW status, it seems that the Court correctly supposes that this category[39] cannot apply to the situation. Therefore, the framework of international armed conflict seems unintelligible.

To conclude the discussion of the appropriate definition of the type of the armed conflict discussed in the Court's decision, it bears noting that the Court does cite numerous scholars who are of the opinion that the conflict is either a non-international one or a conflict of a mixed character.[40] Nevertheless, it does not discuss their arguments. Although it is beyond the scope of this note to engage in an exhaustive discussion of the arguments in favor of defining the conflict as a non-international one, two of the main arguments shall be mentioned briefly. First, both the language and the *travaux preparatoire* of Common Article 3 of GC suggest that the article is intended to apply in armed conflicts between an organization and a state, regardless of whether the conflict occurs in the territory of the

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[36] The Court's decision, *supra* note 1, at para. 18.

[37] For the opinion that an armed conflict arising in an occupied territory is of an international character, *see* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 5-6 (4th ed. 2005); ANTONIO CASSESE, INTERNATIONAL LAW 420 (2nd ed. 2005).

[38] For the specification of these conditions *see* Hague Convention No. IV Respecting the Laws and Customs of War on Land and Annex Regulations Respecting the Laws and Customs of War on Land, (Adopted October 18, 1907), 36 Stat. 2277 T.S. No. 539 (hereinafter the Hague Regulations), Article 1; GC III, Article 4a; AP I, Article 44.

[39] *I.e.*, combatants who are entitled to POW status.

[40] The Court's decision, *supra* note 1, at para. 21. Note also that the U.S. Supreme Court ruled recently that the armed conflict between the U.S. and *Al-Qaeda* is a non-international one. *See* Hamdan v. Rumsfeld, Secretary of Defense, et al., (judgment of June 29, 2006), (No. 05-184) 415 F. 3d 33, also *available at*: http://www.supremecourtus.gov/opinions/05pdf/05-184.pdf.

state or outside of it. The rationale of the article's use in these situations is to broaden the terms of application of the rules of international law, and to prevent the state from applying its own internal rules to the situation, thereby jeopardizing the ability to ensure the protection of fundamental human rights.[41]

Second, a policy argument should be mentioned. As previously mentioned, the framework of international armed conflict seems unintelligible. Not only does it seem that there are no individuals or group members of the terrorists who may be entitled to POW status, there is almost no real possibility that these organizations will follow the rules of international armed conflicts; it is more than doubtful that they will confer POW status on the combatants that they capture or that they will instruct their members to follow the laws of war applicable in that regime. In contrast, the rules of a non-international armed conflict are less detailed and easier to follow, and in that sense, applying this regime, a more reciprocal relationship between the parties to the conflict may be achieved. It bears clarifying that the persuasive force of policy arguments stems from the yet indeterminate nature of the conflict between terrorist groups and states in general and the conflict at hand in particular. Under these circumstances, these arguments may tip the balance in classifying the armed conflict.

Another substantive critical argument is raised against the Court's failure to distinguish between the legal status of the Gaza Strip and the West Bank. Even though the decision referred to the situation that prevailed in Israel and in the area before Israel's disengagement from the Gaza Strip, there was still a difference between the legal status of the Gaza Strip, as opposed to that of the West Bank. According to the Oslo agreements,[42] the Gaza Strip was considered "Area A" which means that Israel has placed both the administrative and the security authority in the hands of the Palestinian Authority. Parts of the territories of the West Bank, on the other hand, were considered "Area B," which means

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[41] COMMENTARY ON THE IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR OF 12 AUGUST 1949, 34-5 (Jean S. Pictet ed., 1958).

[42] Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip, September 28, 1995 Israel-Palestinian Liberation Organization, *reprinted in* 36 I.L.M. 557; An Agreement between the Government of Israel and the Palestinian Liberation Organization Concerning the Gaza Strip and Jericho Area, September 28, 1995 [hereinafter Oslo Agreements].

that Israel retained control of security authority.[43] Hence, most of the West Bank was considered to be under effective control of Israel.

The case of the Gaza Strip was more complicated. Technically speaking, the Gaza Strip was considered unoccupied area or not under effective control of Israel. Nevertheless, in practice, some military operations were undertaken by the Israeli Army in the Gaza Strip since the beginning of the second *Intifada*, and this resulted in continuing Israeli military presence in the Gaza Strip or in some parts of that area. In addition, Israel retained complete control over the passage of people and goods through the borders of the Gaza Strip. This suggests that Gaza (before the disengagement) was subject to some degree of effective control by Israel.[44]

The difference between Area A and Area B should have been acknowledged by the Court since it requires the application of distinctive policies in those territories. The legal regime normally occurring in occupied areas is that of belligerent occupation, and its governing set of rules is composed of the Geneva Convention Relative to the Protection of Civilians[45] (hereinafter GC IV) and Section II of the Hague Regulations.[46] However, it is argued that because an armed revolt may occur in occupied areas, the rules of armed conflict should apply in these areas alongside the rules of belligerent occupation. The remaining question is, therefore, how to decide which system of regulations should take precedence. The answer lies in an evaluation of the degree of the occupying power's effective control in the area. Since an armed revolt may reduce the effective control of the occupying power, it may be argued that the precedence of one of the above-mentioned regimes over the other (*i.e.*, either armed conflict regime or that of belligerent occupation) should depend on the evaluation of the degree of the power's effective control. Hence, the more effectively the

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[43] Some parts of the West Bank such as Jericho were considered "Area A," while most parts were considered "Area C" in which Israel retained responsibility for security matters while responsibility for civil matters was divided between Israel and the Palestinian Authority.

[44] For a discussion of the changes in the legal status of the Gaza Strip after the Oslo Agreements due to Israel's military operations in Gaza, *see*, *e.g.*, David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?* 16(2) EJIL 171, 206 (2005). For a somewhat nuanced position with regard to the status of the Palestinian population in the West Bank and Gaza *see* Yuval Shany, *Israeli Counter-Terrorism Measures: Are They* "Kosher" *under International Law?,* in TERRORISM AND INTERNATIONAL LAW CHALLENGES AND RESPONSES, 96, 105 (Michael Schmitt, ed., 2002).

[45] Geneva Convention No. IV, *supra* note 39.

[46] The Hague Regulations, *supra* note 38.

area is controlled, the less are rules of armed conflict to be applied and the belligerent occupation regime is to take precedence, and *vice versa*.[47]

The application of the theory presented above to the case dealt with by the Court requires that a distinction be made between the policy of targeted killings in areas A and B of the occupied territories. Generally, the policy of targeted killings, which is rightly characterized by the Court as a military means used within the set of rules of armed conflict regime, could not be applied in occupied territories, such as the territories in Area B. This is due to the use of the rules of belligerent occupation in those areas. These rules impose on the occupying power some duties with regard to the occupied population, such as securing their safety; therefore, these regulations do not authorize the occupying power to use military means against the occupied population, except for acts performed solely in self-defense. In contrast, the policy of targeted killings may be applied in non-occupied territories such as the territories in Area A, since the rules of belligerent occupation do not apply there, rather the rules of armed conflict may apply, should an armed conflict arise there.

Nonetheless, and keeping in mind the effective control criterion, it may be suggested that where the occupying power loses some or all of its effective control in the occupied areas, the rules of armed conflict may apply and even take precedence over belligerent occupation regime, depending on the degree of effective control of the belligerent occupation force. By way of contrast, should the belligerent regain effective control in ex-occupied territories, as was claimed by some scholars to be the situation in the Gaza Strip before the Israeli disengagement,[48] belligerent occupation regime may again apply in these territories. Therefore, the prohibition of targeted killings operations in occupied territories is not conclusive but rather relative to the effective control of the belligerent in the territories. On the other hand, the authorization of this policy is also contingent upon the degree of the belligerent's effective control.

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[47] *See*, *e.g*, a British Court's decision stating that the degree of Britain's effective control in Iraq is dependent on the changing circumstances in the area: Case No. C1/2005/0461, C1/2005/0461 B, Al-Skeini & Ors (on the application of), v. Secretary of State for Defence [2005] EWCA Civ 1609 (December 21, 2005). *See also*, the Israeli Supreme Court's statements in cases dealing with the Israeli Army activities in the territories during the second *Intifada,* that the laws of armed conflict should prevail in those territories. *See*, *e.g.*, HCJ 2461/01 Kna'an v. The Commander of IDF Forces in Judea Samaria Area (unpublished); HCJ 4764/04 Doctors for Human Rights v. the Commander of IDF Forces in Gaza [2004] IsrSC 58(5) 385; HCJ 3239/02 Mar'ab v. the Commander of IDF Forces in Judea and Samaria Area, [2003] IsrSC 57(2) 349.

[48] *See supra* note 44 and the accompanying text.

Before concluding the discussion of this argument, two remarks should be made. Although the Court overlooks the distinction between occupied and unoccupied areas, it indirectly reaches similar conclusions by suggesting that when possible, the least harmful means should be employed.[49] This is compatible with the determination that in areas that are subject to effective control, targeted killings should not be authorized. However (and in this sense, the critique is tied to the following arguments against the non-analytical nature of the discussion of the dilemmas in this case), the Court's test does not determine the circumstances under which less harmful means should be employed. In contrast, the effective control argument states explicitly when and where military means should be used and under what circumstances law enforcement instruments should apply.

The second remark refers to the consequences of the Israeli disengagement from the Gaza Strip and its relevance to the above discussion of Israel's effective control in the area. Technically and formally speaking, the disengagement has led to a loss of most of Israel's effective control in Gaza. Formally speaking, Israel no longer controls or is responsible for the passage of goods and persons through the borders of Gaza; in addition, there is no massive Israeli military presence in Gaza, and the fact that at times Israel undertakes military operations there (most of them conducted by the air force or by artillery forces) does not mean that Israel has effective control in the area, in terms of the Hague regulations.[50] This change in the legal status of the Gaza Strip and in the degree of Israel's effective control over it may affect the legality and the frequency of targeted killings carried out in this area. Since Israel lost at least most of its effective control in Gaza, a belligerent occupation regime may no longer apply in this area and Israel's response to military activities coming from Gaza should be governed by an armed conflict regime. Therefore, it is likely that should the conflict worsen, the frequency of operations of targeted killings will increase, since law enforcement means, such as detentions, become unpractical.

The above analysis may result in different outcomes as to the legality of the policy of targeted killings in the different parts of the territories occupied by Israel and in the Gaza Strip. It demands, in fact, that before each and every operation of targeted killing, an evaluation of the effective control in the area be made in order to determine the legality of the operation. As claimed in the following section, this evaluation is compatible with the

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[49] The Court's decision, *supra* note 1, at para. 40.
[50] Hague regulations, Article 42.

position that the Court seems to adopt, without providing sufficient justification for it, according to which targeted killing operations should be carried out carefully and with caution.

The third substantive critique is directed at the Court's ruling on the issue of unlawful combatants. This issue is related to the main question of the legality of targeted killings in the sense that having decided that the policy of targeted killings is, under certain conditions, legally acceptable, the Court then had to determine who the legitimate targets of this policy are. The Court, therefore, discusses whether members of terrorist organizations are to be defined as unlawful combatants or whether they should be defined in some other fashion.

The question of the legitimacy of the category of unlawful combatants in international humanitarian law (IHL) has long been a subject of debate. The basic instruments of IHL such as the Geneva Conventions, the Additional Protocols and Hague Regulations define two categories of persons who are located in the battlefield, i.e., combatants and civilians, and do not address the category of unlawful combatants. Nevertheless, this category is referred to in some military manuals,[51] national legislation[52] and case law.[53] These sources generally define unlawful combatants as persons who actively participate in hostilities without adhering to the laws of war. Some scholars, the majority of them addressing the issue after the events of 9/11, have opined that international law should acknowledge a third category of unlawful or non-privileged combatants who may be considered legitimate targets as well as being subject to criminal prosecution for their unlawful acts.[54] In contrast, the position of the ICRC is that no such category was intended in the basic instruments of IHL and that creating one would blur the distinction between combatants and civilians. Eventually, it would endanger the protections accorded to civilians

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[51] THE U.S. ARMY'S OPERATIONAL LAW HANDBOOK, Ch. 2, 6 (2002); HERSCH LAUTERPACHT (The War Office),the British Manual of Military Law: Part III - The Law of War on Land (1958), n. 9.
[52] The Law for Imprisonment of Unlawful Combatants, 2002, SH 1834, 192.
[53] Osman Bin Haj Mohamed Ali v. Public Prosecutor [1969], 1 A.C. 430 (P.C); United States ex rel Quirin v. Cox, 317 U.S. 1 (1942); Israel Military Court sitting in Ramallah, Military Prosecutor v. Omar Mahmud Kassem and Others (April, 13 1969), *reprinted in* 42 INT'L L. REP., 479 (1971).
[54] John C. Yoo & James C. Ho, *The Status of Terrorists,* 44 VIR. J. OF INT'L L. 217 (2003) ; YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 29-30 (2004); Yoram Dinstein, *Unlawful Combatancy* 32 ISR. YB ON HR 249 (2002); Richard R. Baxter, *So-called "Unprivileged Belligerency": Spies, Guerrillas, and Saboteurs*, 28 BRITISH YB OF INT'L L. 323 (1951) and Richard R. Baxter, *The Duties of Combatants and Conduct of Hostilities (Law of the Hague)*, *in* INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW 105 (Henry Dunant Institute and UNESCO eds., 1988).

and make it more difficult to ensure that they are left out of the scope of those considered legitimate targets.[55]

Formally and theoretically speaking, the Court seems to deny the third category option. Barak says that both existing treaty law and prevailing customary international law do not lay the legal foundation for acknowledging a third category.[56] The significance of this conclusion is that members of terrorist organizations are defined as *civilians*; yet, not as civilians who refrain from taking part in militant activities. They are to be seen rather as civilians who participate directly in hostilities. Had the Court accepted the category of unlawful combatants, the protections accorded to the persons under this category would have been much more limited. In fact, should they have been defined primarily as combatants, they might not only have been considered legitimate targets during their participation in hostilities but rather throughout the whole period of their membership in their organizations. Therefore, in the sense of exposure to the dangers of the battlefield, the persons participating in hostilities would have become much more similar to ordinary combatants; yet, they would have not been accorded the privilege of POW status, to which ordinary combatants are entitled.

Hence, denying the third category option, the Court accepts the language of IHL basic instruments, i.e., GC[57] and AP's,[58] and is confined to the constraints set forth by them. Therefore, it acknowledges that members of terrorist organizations should be considered legitimate targets only under strict terms determined by international customary law and treaty law[59] and under no other circumstances may they be targeted.

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[55] Knut Dorman, *The Legal Situation of "Unlawful/Unprivileged" Combatants* 85 IRRC 45 (2003). For literature that supports the ICRC's position, *see* Orna Ben-Naftali and Sean S. Gleichgevitch, *The Imprisonment of Enemy Combatants Who Are Not Entitled to a Prisoner of War Status*, 7 *Hamishpat,* 435 (2002) [in Hebrew]; Shlomy Zachary, *Between the Geneva Conventions: Where Does the Unlawful Combatant Belong*, 38 ISR. L. REV. 378 (2005); Hilly Moodrick-Even Khen (written under the supervision of Mordechai Kremnitzer), *Unlawful Combatants or Unlawful Legislation? On the Imprisonment of Unlawful Combatants Law (2002)*, (, 58 THE ISRAEL DEMOCRACY INSTITUTE RESEARCH PAPER, 15-24 (2005) [in Hebrew]; Antonio Cassese, *Expert Opinion on Whether Israel's Targeted Killings of Palestinian Terrorists is Consonant with International Humanitarian Law*, written at the request of the Petitioners in HCJ 769/02, *supra* note 1. For a somewhat nuanced position, according to which the civilians participating directly in hostilities are called "unprivileged belligerents" *see*, Kenneth Watkin, *Combatants, Unprivileged Belligerents and Conflict in the 21st Century*, 1 IDF. L. R. 69, 74 (2003).

[56] The Court's decision, *supra* note 1, at para. 28.

[57] GC Common Article 3.

[58] AP I Article 51(3), AP II Article 14(3). In fact, the Court does not refer to AP II since this protocol deals with non-international armed conflict, whereas, as previously mentioned, the Court refers to the conflict discussed in its decision as an international one.

[59] I.*e.*, when they take direct part in hostilities. *See* AP I Article 51(3), AP II Article 14, GC Common Article 3.

Notwithstanding the above conclusions, a careful reading of the decision discloses some ambiguity with regard to the Court's stance on the subject of unlawful combatants. The very same paragraph in which Barak refuses to acknowledge the category of unlawful combatants concludes with the following sentence: "…we shall now proceed to the customary international law dealing with the status of civilians who constitute *unlawful combatants*" (emphasis added H.M.E.-K).[60] The next section is even titled: "Civilians who are Unlawful combatants,"[61] and Barak repeats this expression several times throughout the decision.[62] Barak himself explains this ambiguous referral to the term "unlawful combatants" by the need to apply a "dynamic interpretation" to the situation: "Rules developed against the background of a reality which has changed must take on dynamic interpretation which adapts them, in the framework of accepted interpretational rules, to the new reality (*see Jami'at Ascan*, at p. 800; *Ajuri*, at p. 381)."[63]

This reading and interpretation is strengthened by Rivlin's ruling, which says that, in practice, Barak's dynamic interpretation creates a third group with a special legal status. In Rivlin's opinion, the formation of such a status is right and necessary in light of the demands of a changing reality. As mentioned earlier, he suggests referring to this group as international-law-breaking civilians, or "uncivilized civilians."[64]

What may be extrapolated from the above statements of Barak and especially those of Rivlin is a willingness to narrow the protections accorded to the persons participating directly in hostilities in a way somewhat similar to limiting these protections by creating a formal third category. This intent is best reflected in Barak's suggestion to distinguish individuals who devote all of their time to terrorist organizations,[65] and hence, to widen considerably the time span of their direct participation in hostilities, in which targeting them is authorized. In this respect, there are no practical consequences of the denial of the category of unlawful combatants, and yet, it bears noting that the example of the person who devotes all of his time to the terrorist organization is at one end of the spectrum that Barak describes. For the other possible cases, the time constraint of the authorization of the targeting of terrorists may be of greater significance. Hence, not considering them to be

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[60] The Court's decision, *supra* note 1, at para. 28.
[61] *Id.* at Section 6.
[62] *See*, *e.g., id.* at paras. 29, 31, 34, & 35.
[63] *Id.* at para. 28.
[64] The Court's decision, *supra* note 1, at para. 2 & 3 of Rivlin's decision.
[65] *Id.* at para. 39.

unlawful combatants may have substantive implications on the degree of protection accorded to them.

Only in the future will it become apparent which of the above readings of the Court's ruling on the issue of unlawful combatants will become incorporated into international law discourse and how it will affect that discourse. On the national level, the interpretation of the court will probably be re-examined and challenged in the course of petitions regarding the Imprisonment of Unlawful Combatants Law (2002)[66] brought before Israeli courts.

Before discussing the Court's analysis of the main question before it, it should be mentioned that the Court, in fact, deals only with the questions of the legitimacy of the objectives of targeted killings and does not address the question whether the killings *per se* are legitimate means according to international law. It seems that once the Court defines the situation prevailing in the occupied territories[67] as an armed conflict, it accepts that the killings themselves, whether targeted or not, can be, under certain circumstances, legitimate military acts, and the only question left for it to discuss is whether the *targets* are legitimate according to international and national law. Bearing this in mind, we shall proceed to examine the Court's analysis of the circumstances under which the targets are legitimate; in other words, its analysis of the term "direct participation in hostilities."

III. A Critique of the Court's Non-Analytical Approach to the Question of Direct Participation

Whether or not the terminology of unlawful combatants can be read into the Court's ruling, there is no doubt that members of terrorist organizations are referred to by the Court as "civilians who take a direct part in hostilities."[68] In its determination of "the basic principle," according to which a civilian is protected as long as she does not participate in hostilities and loses this protection only for such time as she commits direct hostile acts,[69] the Court adheres to the schematic definition of article 51(3) of AP(I), while accepting that it

66 The Law for Imprisonment of Unlawful Combatants , *supra* note 52.
67 Referred to as "the area" by the Court.
68 Title No.6 of the Court's decision, *supra* note 1 *et seq.*
69 *Id.* at para. 31.

represents customary international law.[70] Article 51 of AP(I) refers to the protection of civilian population. Article 51(3) reads: "Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities."

Having acknowledged that only those who participate directly in hostilities and only for such time as they do so are to be considered legitimate targets,[71] the Court then examines the sub-questions: What is the legal meaning of *taking part* in hostilities,[72] what is *direct* participation,[73] and what is the legal definition of its duration?[74]

Analyzing the first question regarding the nature of participation in hostilities, the Court states that "hostilities" are generally viewed as acts which by their nature and objectives are intended to cause damage to the army, and yet, it adds that similar acts that are intended to cause damage to civilians should be added to that definition.[75] With regard to the second question, it seems to the Court that according to the international literature, there is no customary agreed-upon definition of the term "direct" in the context under discussion. Hence, it reaches the conclusion that "there is no escaping going case-by-case, while narrowing the area of disagreement."[76] From that point on, the Court gives examples of acts that should be understood as direct participation in hostilities and of other acts that should not be included in such a definition.[77] It does not engage in any analytic discussion whatsoever of that term. The Court concludes this discussion with a brief paragraph dealing with the status of persons who enlist those who take a direct part in the hostilities, and the status of those who send them to commit hostile acts. In a couple of sentences, the Court states that the requirement that the role played be "direct" should not be narrowly construed to include only the person committing the physical act of attack. The others in the chain of command, i.e., those who plan and decide upon the hostile act and those who send the person to commit it, participate directly in hostilities as well, since their contribution is direct and active.[78]

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[70] *Id.* at para. 30.
[71] *See* the Court's affirmation in para. 23 of the Court's decision: Civilians who do not participate directly in the conflict should be legally protected and left unharmed.
[72] *Id.* at para. 33.
[73] *Id.* at paras. 34-37.
[74] *Id.* at paras. 38-40.
[75] *Id.* at para. 33.
[76] *Id.* at para. 34.
[77] *Id.* at para. 35.
[78] *Id.* at para. 37.

The third dilemma with which the Court deals is presented by the expression "for such time." The decision of what is the exact time span of the civilian's participation in a hostile act is of major importance since only for such time as she participates in hostilities may the civilian be targeted. As with the above issue, the Court mentions that international law has not yet arrived at a definitive conclusion regarding this controversial question. Again, the Court's solution is to examine situations on a case-by-case basis.[79]

The Court mistakenly links the time element to its suggestion of four principles that should guide the individual evaluation of each case. In fact, these principles or sub-tests have no bearing whatsoever on the definition of the temporal element. Their core is rather that of proportionality, as they propose means of caution in carrying out the policy of targeted killings[80] and they focus on the least harmful means to implement this policy. The Court stresses that targeting the civilian taking a direct part in hostilities should not be the default option; arrest, investigation, and criminal procedures should be preferred over attacking the civilian who participates in hostilities.

Discussion of the proportionality test forms the basis of the Court's final positive statement. As presented in the introduction of this note, the Court adheres to the principle of "proportionality *stricto senso,*"[81] i.e., that there be a proper proportional relationship between the military objective and the civilian damage. The Court's analysis of the balance of values demanded by this principle is, again, undertaken by a case-by-case evaluation.[82]

Having presented the Court's assertions in its decision, we will now scrutinize them. Our basic claim is that the Court's discussion of the relevant questions arising from the petition is neither complete nor analytical. As a result, the decision misses its goal of setting forth instructions for the operational and administrative authorities regarding the circumstances under which targeted killings are legal. In the following paragraphs, we shall apply this criticism to the discussion of three basic questions that, in our opinion, the Court has left quite as open as they were when presented to it. As we adhere to the Court's reliance on the basic principle described above, and since we find no difficulties with the

[79] *Id.* at para. 40.
[80] *I.e.*, claiming that well-founded information with regard to both the identity and the activity of the civilian is needed.
[81] The Court's decision, *supra* note 1, at para. 44.
[82] *Id.* at para. 46.

Court's analysis of the "taking part" component of the principle,[83] we shall focus on the remaining questions as follows: What constitutes direct participation in hostilities? What is the meaning of the expression "for such time," and how should the proportionality test be interpreted?

The Court's analysis of the term "direct participation in hostilities" is lacking in the following aspects. First, the discussion focuses on the interpretation of the term "direct" and almost completely neglects an equally important question: who is a direct *participant*. The Court correctly mentions that customary international law has not clarified the term direct participation; however, the Court's conclusion that only through a case-by-case examination may some sort of definition be extrapolated is, incorrect.

One of the methods by which the Court could have formed a more analytic definition of direct participation is by undertaking an analysis of the question of who should be considered a direct participant in hostilities. As previously mentioned, the Court does devote a few sentences to the active and direct nature of participation of leaders or, more accurately, commanders in the chain of command in terrorist organizations. Nevertheless, the Court does not give reasons for its assertion that those who decide upon and plan hostile acts and those who enlist persons to commit them are themselves active and direct participants. In fact, the Court does not specifically explain whom are those persons that perform the acts of deciding, planning, and enlisting. Are they military leaders of terrorist organizations? Are they political leaders? Can they be considered to include only high-ranking leaders or can lower ranking personnel also be viewed as direct participants? Answering these questions could have provided greater insight into the Court's perception of the term "direct participation."

Another related aspect in which the analysis of the term "direct participation" is lacking is the Court's preference for a case-by-case examination rather than an analytical definition. The Court is satisfied with giving examples of direct and indirect participation[84] and does not attempt to find their common denominator. Indeed, the question at stake has direct practical implications on the actions of the Army and the executive branch. Therefore, it is worthwhile learning from the multiple typical examples that the Court

[83] In contrast to the analysis of taking *direct* part, which I criticize in the following paragraphs.
[84] The Court's decision, *supra* note 1, at para. 35.

provides,[85] as the executive branch is likely to face such cases when deciding the question of who is a direct participant in hostilities.

It is also true that the question before the Court is quite exceptional in the sense that customary international law has not formulated an agreed-upon definition of the term "direct participation." [86] As a consequence, a theoretical basis for deciding the question is lacking. However, this is, in our view, exactly where the Court misapprehends its role, as it is precisely the role of the Court to extrapolate, from other rules that are accepted and agreed-upon in international law, a definition that would be consistent within the context of the conventions of international law.[87] Having neglected this mission, the understanding of the Court's role may become completely distorted in the eyes of those who are to follow its instructions, i.e., executive authorities. Although the Court devotes considerable space in its decision to explaining why the questions brought before it are legal questions that should be decided by the courts,[88] it undermines this conclusion by proposing that the issues be determined on a case-by-case basis rather than setting forth guidelines that could serve the authorities on a prospective basis. In fact, by deciding that a case-by-case analysis should be used, the danger arises of creating the opposite and misleading impression that the question of who is to be considered a direct participant, or what is a legitimate target, is an operational question, to be decided exclusively by the Army commanders or by political leaders making operational decisions (for example, the Security Cabinet) according to operational criteria.

The above conclusion is emphasized all the more by the Court's use of controversial examples, such as the case of the civilian who drives ammunition to the battlefield,[89] or the example of human shields.[90] The Court presents the divergent views on these cases, *i.e.*, whether or not the driver or people who serve as human shields could be considered

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[85] Some of the examples given for direct participation are: a person who collects intelligence on the army, whether on issues regarding the hostilities or beyond those issues; a person who transports unlawful combatants to or from the place where the hostilities are taking place; a person who operates weapons which unlawful combatants use, or supervises their operation, or provides service to them, regardless of the distance from the battlefield. Examples of persons who are considered to be *indirect* participants are: a person who sells food or medicine to an unlawful combatant; a person who aids the unlawful combatants by general strategic analysis, and grants them logistical, general support, including monetary aid. *See* the Court's decision, *supra* note 1, at para. 35.

[86] *Id.* at para. 34.

[87] *See* Vienna Convention on the Law of Treaties (Adopted May 23, 1969), 1155 U.N.T.S 331, Article 31(3) (c) which refers to the rules of interpretation of treaties and reads: "[One should account] any relevant rules of international law applicable in the relations between the parties."

[88] The Court's decision, *supra* note 1, at para. 47-54.

[89] *Id.* at para. 35.

[90] *Id.* at para. 36.

legitimate targets, and then decides on these matters, especially in the driver case, without providing a general argument to support its decision. Referring to the human shields case, the Court justifies viewing such persons as legitimate targets when they carry out this role of their own free choice. Nonetheless, as the Court does not present a general theory of direct participation, it does not explain how acting on such free will changes the status of these persons from civilians to direct participants in hostilities.[91] The Court's reasoning in the civilian driver case is even more problematic, because the conclusion in that instance is made without providing any general arguments whatsoever. The Court only states that it supports the viewpoint of those who see the driver as a direct participant and does not elaborate on the characteristics that place her in this category.

In fairness to the Court, it should be admitted that even if guidelines had been provided for dealing with the hard cases, it is far from certain that they would have produced clear-cut answers. However, as will be shown in the following section, normative legal criteria should lead to non-contingent answers in the easier cases and provide the administrative authorities with more tools to reach consistent answers in the harder ones.

The second question to which the Court gives only a partial answer is the question of the duration of direct participation in hostilities, or in other words, what is the meaning of "*for such time* as they take a direct part in hostilities"? Again, the main weakness of the Court's discussion of this issue is the case-by-case examination, which carries the same dangerous implications discussed previously. In the following section, a few legal guidelines are suggested that should supply a theoretical basis for answering both the question of direct participation and its duration.

In addition, and as a result of the lack of an analytic approach, the four principles suggested by the Court as guidelines for the administrative authority lack a theoretical basis. One of the principles that the Court sets forth as a guideline for the application of the policy of targeted killings is the principle of proportionality with regard to the collateral damage caused to bystanders or civilians not participating in hostilities. As explained earlier, in its discussion of this principle, the Court simply repeats the formulation of the principle in IHL

[91] Note that we do not necessarily deny the Court's conclusion, but rather claim that it lacks a general theoretical basis. For the opposite viewpoint, claiming that even civilians who are located in military installations could not be referred to as legitimate targets but that injuring them may be considered legitimate collateral damage, when caused in accordance with the rules of proportionality, *see* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT (Dieter Fleck ed., 1995) 162.

instruments and accepts their formula. Although it is clear to the Court that this formula is far from clear or unequivocal,[92] the Court does not make a significant effort to concretize or to clarify it. The Court says that the proportionality test requires balancing competing values. In this case, the values at stake are the anticipated military advantage and the estimated damage to civilians. The Court also says that military advantage should be direct and concrete but it does not elaborate more on this critical point and does not explain the meaning of these terms.

To conclude this section, a further argument for the necessity of an analytical discussion of the terms under which targeted killings may be legal should be elaborated upon. This argument rests upon the absence of a local law that authorized the Army to conduct these killings. In similar cases in which the High Court of Justice has reviewed the legitimacy of practices undertaken by security forces in the past,[93] it relied either on an Israeli law,[94] or on a procedure authorized by a special ministers committee for General Security Services (hereinafter GSS) investigations.[95] In the current case of targeted killings, prior to bringing the case before the Supreme Court, no legal authorization for this practice prevailed, and the Army was only relying on its general authorization to defend Israeli residents. Under these circumstances, and when the only legal source for deciding the rules that govern the Army's practice of targeted killings is the Court's ruling, the Court should have set forth much clearer criteria. Only by so doing could the Court's instructions take the place of a parliamentary law or regulation.

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[92] The Court's decision, *supra* note 1, at para. 46.

[93] I.*e.*, the GSS torture case in which the Court decided whether some physical investigative means were legally acceptable. *See* HCJ 5100/94 The Public Committee against Torture in Israel v. the Government of Israel [1999] IsrSc 53(4) 817 [hereinafter the *GSS Torture* case]. In the "bargain chips" case the Court discussed the question of whether serving as bargain chips for negotiation on the release of Israeli prisoners of war was a legitimate reason for detention under the Emergency Powers (Detention) Law [1979] 33 S.H. 89. *See* A.D.A. 10/94 Anonymous Persons v. the Minister of Defense [1997] IsrSC 53(1) 97 [hereinafter the *Bargain Chips* case].

[94] The *Bargain Chips* case, *id.*

[95] The *GSS Torture* case, *supra* note 93.

IV. Reflections on Ways to Complete the *lacunae* in the Court's Decision

This section contains proposed guidelines for formulating analytic criteria, which have two essential purposes. First, to supply the theoretical basis needed for deciding the questions under consideration; second, to undo the impression created unintentionally by the Court's discussion that the question of who is a legitimate target is for the executive or operational authorities to decide, whereas, in fact, it is a purely legal question that should be resolved in legal forums.

One of the possible legal yardsticks to decide the question of direct participation in hostilities can be extrapolated from AP(I) article 52(2) which reads:

> Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

This article suggests the following criteria for deciding what a legitimate inanimate target is. First, the objective should contribute to military action. Second, it suggests a "risk test" in the sense that it relates to a legitimate target as one that poses a risk to the other party and which may be destroyed in order to thwart this risk. Truly, this article refers to objects and not to persons, and yet, it is beyond doubt that its underlying rationale may apply to the frustration of acts of persons who pose a risk to the other party's army and civilians and whose killing may result in a (definite) military advantage. Indeed, using this article as a means of interpretation requires defining what constitutes a definite military advantage. Does it refer to a single military action, to several operations, or to the whole battle?[96]

[96] For a discussion of these questions *see* W. Hays Parks, *Air War and the Law of War*, 32 A. F. L. REV. 1, 141-142 (1990); William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV., 91, 107 (1982).

Having decided this question, specific criteria could be formulated that would impart greater validity to the determination.[97]

The risk test is also applicable to the question of the time span in which one is to be considered as participating directly in hostilities. From the moment when she poses a risk to the counter-terrorist forces or to civilians, the terrorist should be considered a direct participant in hostilities, who therefore may be targeted. The application of this general test requires making a determination regarding questions such as: At which of the various stages that constitute the terrorist act is the risk to the counter-terrorist forces created; and is the planning stage of the act sufficient to be viewed as putting the forces in danger? Perhaps the mere participation in a terrorist group constitutes a threat to the counter-terrorist force?[98] In order to decide these questions, one should analyze the immediate danger parameter, evaluate its relevance in the IHL context[99] and compare it to the anticipated military advantage from the killing of the terrorist. Some scholars have, in fact, discussed the immediate danger parameter, and concluded that the promptness should be referred to the need to respond rather than to the danger. That is, the threats posed by terrorism are different from those understood by the prevailing concept of self-defense, *i.e.*, threats that constitute an immediate and tangible danger to the victim of the attack. Hence, terrorist acts should be frustrated at an earlier stage than that of the emergence of an immediate danger.[100]

Another important distinction that should be made is the distinction between leaders and ordinary participants. The court refers to this issue very briefly and unsatisfactorily. However, in our view, classifying each group of persons in the terrorist organization and

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[97] For a discussion of another suggested risk test according to which a legitimate target is one that the other party's agent believes, in good faith, to be risking him, *see* ICRC second Expert Meeting, *supra* note 6.

[98] *See*, *e.g.* Kretzmer, *supra* note 44, at 197. This question has been dealt with at length in the reports of the Geneva Experts meeting, *supra* note 6, in the context of deciding the status of persons who participate in hostilities on behalf of an organization according to AP II, Article 14. While some experts suggested that the protocol's reference to a status of "civilians" implies that there should also be a status of "fighters," who constitute a threat to the other party merely by their membership in the militant group, others objected to this view and claimed that the silence of the protocol regarding such a category (*i.e*, "fighters") should instead be understood as lack of recognition of such a group. According to these experts, had the protocol intended to create such a category, it would have expressly defined one, as it did with regard to the group of "civilians," in Article 14. According to this reading of the protocol, the mere participation in a group does not constitute a threat to the other party, but rather only specific acts of direct participation create such a risk.

[99] In contrast, for example, to its conclusive relevance to criminal law self-defense rules. It may be claimed that the armed conflict concept of risk is different than that common in the criminal law self-defense paradigm. That is, the risks to the soldiers or the civilian population may be generated at earlier stages than that at which the danger becomes immediate and tangible, which is the prevailing concept of criminal law self-defense rules.

[100] Michael N. Schmitt, *State–Sponsored Assassination in International and Domestic Law*, 17 YALE J. INT'L. L. 609, 648 (1992); Kretzmer, *supra*, note 44, at 203; Georg Nolte, *Preventive Use of Force and Preventive Killings: Moves into a Different Legal Order*, 5 THEORETICAL INQ. L. 111, 124 (2004).

understanding its role in carrying out the terrorist act could assist in coming up with a general definition of direct participation. First of all, a distinction should be made between political leaders not directly in charge of carrying out military acts, on the one hand, and those political leaders who directly influence the process of carrying out such acts, together with operational leaders who are integrated in the chain of command, on the other hand. Afterwards, the functional role of those who seem to be directly involved in military activities should be analyzed in light of two basic doctrines: the doctrine of command responsibility[101] and the doctrine of organizational and functional control; the latter function is applied mainly in criminal law[102] but could, by way of analogy, be applied to IHL categories of combatants and participants in combat. The use of these analytical yardsticks may be helpful in characterizing the functions of a direct participant, thereby forming a definition of direct participation.[103]

Legal criteria are also required for supplying the theoretical foundation for the Court's four principles, which should guide the carrying out of the targeted killings policy. The decision's lack of such criteria is particularly apparent with respect to its holding that one has to choose the least harmful means for thwarting terrorist activities. This holding should have been based on a distinction between operational leaders of terrorist organizations (and also political leaders who are personally involved in the carrying out of military acts) and regular activists of these organizations. The Court should have acknowledged two factors that make it more difficult for the executive authorities to decide who takes a direct part in hostilities and at what point in time can she be traced as such: the

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[101] This doctrine is widely accepted in international law. For some of its modern formulations *see*, API Articles 86,87; Statute of the International Criminal Court, Article 28 UN Doc. A/CONF/ 183/9, *reprinted in* 37 ILM 999 (1998), corrected through May 8, 2000, by UN Doc. CN.177.2000.TREATIES-5 (hereinafter ICC Statute); Report of the Secretary-General Pursuant to Paragraph 2 of S.C. Res. 808, U.N. SCOR, 48th Sess., Annex, art. 7, at 38, U.N. Doc. S/25704 (1993) (hereinafter ICTY Statute); S.C. Res. 955, U.N. SCOR, 9th Sess., 3453d mtg., Annex, art. 6, at 5, U.N. Doc. S/RES/955 (1994) (hereinafter ICTR Statute); United States v. von Leeb (1948), in: 11 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, October 1946-April 1949, at 462 (1949-53) and the case-law of the ICTY and the ICTR, such as Prosecutor v. Delalic (Judgment of November 16, 1998), IT-96-21-T, 343 (ICTY Trial Chamber II), *available at* http://www.un.org/icty/celebici/trialc2/judgement/cel-tj 981116e.pdf (hereinafter Celebici); Prosecutor v. Delalic (Judgment of February 20, 2001), IT-96-21-A, 231 (ICTY Appeals Chamber); Prosecutor v. Akayesu (Judgment of September 2, 1998), ICTR-96-4-T, PP 486-491 (ICTR Trial Chamber I), *available at* http://www.ictr.org/

[102] *See*, *e.g.*, ICC Statute, Article 25, *id* and Kai Ambos, *Article 25,* in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (Triffterer Otto ed., 1999), margin no. 9.

[103] Note also Daniel Statman's suggestion to define legitimate targets according to an analysis of the person's role in the organization rather than relying on the mere concept of membership. Daniel Statman, *The Morality of Assassination: A reply to Gross,* 51(4) POL. STUD. 777-778 (2003).

problem of identifying members of terrorist organizations and their possible means of renouncement and relinquishment. Since members of terrorist organizations do not wear uniforms or carry a distinguishing emblem, it might be difficult to identify them or the role that they play in their organization. In addition, this lack of an identifying emblem makes it more difficult for them to surrender in a way perceptible to the other party to the conflict. While the regular soldier can cut herself off from the military framework simply by taking off her uniform and laying down her arms, the member of a terrorist organization does not have such distinct options. Therefore, she might mistakenly be considered a member of the organization although she no longer affiliates with it.

It can be argued that the above-mentioned difficulties take into consideration the right to life of the terrorist or the ex-terrorist while disregarding the right of the State to defend its residents. Distinguishing between leaders of terrorist organizations and ordinary members may help in resolving the dilemma. Since it is less likely that difficulties will be encountered in identifying well-known (either to the public or to security branches) leaders and because it is reasonable to presume that these people (*i.e.*, the leaders) do not regularly renounce their roles in their organization, it seems legitimate to refer to them as taking a direct part in hostilities and even to assume that their participation is not restricted to a limited period of time but rather lasts throughout their period of leadership.[104]

By contrast, the effects of the imperfect ability to identify ordinary members of terrorist organizations and the difficulty in ensuring that they have a significant and realistic possibility to abandon their participation in hostilities create a situation in which we are unable to identify the duration of their participation in hostilities. Therefore, the ordinary member of a terrorist organization should not be targeted during the planning stage of an operation but rather, only when she sets out to perform it or is actually preparing a bomb; in other words, when she is an actual ticking bomb.[105] This analysis could form the theoretical

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[104] A similar logic guides Ben-Naftali and Michaeli's suggestion to refer to operational leaders of terrorist organizations who are directly involved in the carrying out of terrorist acts as combatants. The consequence of such a definition is broadening the period of time in which they should be regarded as legitimate targets, so that they may be targeted at any time throughout the entire period of their leadership. *See*, Orna Ben-Naftali and Keren Michaeli, "*We Must Not Make a Scarecrow of the Law": A Legal Analysis of the Israeli Policy of Targeted Killings*, 36 CORNELL L.J. 233, 278, 290 (2003).

[105] *See also* Ben-Naftali & Michaeli, *id.* The writers suggest that in reference to ordinary activists of terrorist organizations, only armed persons should be targeted and only for such time as they use their weapons. *Id.* at 278, 290.

justification for the Court's ruling that the least harmful means of frustration needs to be employed.

Another analytic justification for the Court's conclusion as to use of the least harmful means lies in the application of human rights law (HRL) discourse to interpret IHL norms and rules. This is an interpretive means that was recently widely used by several international law judicial bodies in the context of analyzing the right to life.[106] Acknowledging the above-mentioned problems of identification and actual possibility of regret, it may seem that IHL rules of targeting of regular activists of terrorist organizations should be analyzed according to HRL rules and discourse, since the IHL set of rules by itself may lead to an inadequate result.[107]

In light of the above, and with regard to the Court's suggestion of *ex-post* review, it seems that an *ex-ante* review of the circumstances underlying the execution of each and every targeted killing is more compatible with the duties of precaution that the Court imposes on the operational authorities. The reviewing body should also be the one authorized to approve those operations. Its board should include operational figures, such as commanders of the Army, as well as jurists, such as the Military Advocate General, and civilian bodies that will represent the case of the suspect who is a candidate for a targeted killing. This body is, therefore, to evaluate the pros and cons for performing an operation of targeted killing and approve or disapprove it only after having thoroughly examined the relevant considerations.[108]

The final question that is insufficiently resolved by the Court's decision is that of proportionality. The standard of proportionality mandated by IHL rules determines what is an indiscriminate and, therefore, forbidden attack: "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a

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[106] *See*, *e.g.*, Juan Carlos Abella v. Argentina, Case 11.137 Inter-Am. C.H.R. Report No. 55/97, OEA/Ser.L./V./II.95 doc. 7 rev. 271 (1997) [hereinafter the *Tablada* case]; Inter-Am. Ct. H.R. (Ser.C) No. 70 (2000) [hereinafter the *Bamaca-Valesquez* case]; Ergi v. Turkey, *supra* note 6. Compare with cases where neither the Inter-American Court nor the European Court have applied the cumulative theory, such as Inter-Am. Ct.H.R. (Ser.C) No. 67 (2000) [hereinafter the *Los Palermas* case]; Loizidou v. Turkey, Application No. 15318/89, Judgment of 18 December 1996, 310 Eur. Ct. H.R. (Ser A) (1995).

[107] For possible ways to apply HRL to the issue of targeted killings *see*, Ben-Naftali & Michaeli, *supra* note 104, at 274, Kretzmer, *supra* note 44, at 202-4 and Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict,* 98 AM. J. INT'L L. 1, 23 *et seq.* (2004).

[108] For a detailed suggestion of the guidelines for the establishment of such procedures *see* Mordechai Kremnitzer, *Is Everything Kosher When Dealing with Terrorism? On Israel's Preventative Killings Policy in the West Bank and in the Gaza Strip*, 60 ISR. DEM. INST. RES. NOTE 35-6 (2005) [in Hebrew].

combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[109]

The criterion set forth in the above-quoted rule for estimating unavoidable collateral damage to civilians who are in the neighborhood of legitimate targets is one of the most inaccurate norms of international law. This is not only due to its demand to evaluate abstract values that cannot be quantified, but also because it requires balancing them. The difficulties in working out and applying the formula suggested by IHL for determining proportional damage to a civilian population have been discussed by quite a few scholars,[110] and yet they have not reached an agreed-upon conclusion. Nevertheless, some guidelines for carrying out the process of balancing the competing values can be extrapolated. For example, it has been suggested that the respect armies should have for the human dignity of enemy civilians should impose on them a positive duty to take precautions to reduce the degree of harm, and to use more discriminating weapons even if they are more expensive or take longer to take effect. Nevertheless, this duty is meant only to reduce harm to enemy civilians and it does not require that the soldiers risk their own lives in order to protect these civilians.[111]

Another proposal for creating the above-discussed balance focuses on the ability to estimate the probability of the competing values. According to this suggestion, the more significant and clear the anticipated military advantage is, the greater the precedence it should be given over the anticipated collateral damage. Thus, in a case where the anticipated military advantage is significant and relatively certain, the operation should be authorized even when it is estimated that the damage to civilian population will not be negligible. However, when the anticipated military advantage is not clear, greater weight should be accorded to the anticipated collateral damage, such that the there is an inverse proportion between the significance and certainty of the anticipated military advantage and the anticipated collateral damage to the civilian population.[112]

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[109] AP I Article 51(5)(b).

[110] Some examples are: Fenrick, *supra* note 96; William .J. Fenrick, *Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia*, 12 (3) EJIL 489 (2001); Parks, *supra* note 96; Kretzmer, *supra* note 44, at 200-1.

[111] Eyal Benvenisti, *Human Dignity In Combat: The Duty To Spare Enemy Civilians*, 39 ISR. L. REV. 81, 89, 93 (2006).

[112] Asa Kasher & Amos Yadlin, *Military Ethics of Fighting Terror: An Israeli Perspective*, 4(1) J. MILITARY ETHICS, 3 (2005).

It seems, then, that the key question is what constitutes a concrete and direct military advantage, the possible parameters of which have been previously discussed in the context of Article 52, AP(I). The answer to this question lies, in our opinion, in weighing all of the above-discussed factors, which determine the special character of combating terrorism, such as the contribution of leaders to the activity of terrorist organizations, the problems of identifying regular activists in terrorist organizations and of perceiving their intention to abandon these organizations and the influence and implications of HRL discourse on the application of IHL rules. Deciding this question would have clarified the amorphous standard of concrete and direct military advantage and would have rendered the balancing process both more tangible and less casuistic.

V. Conclusion

In this note we have shown that the significance of the decision of the High Court of Justice stands in contrast to the unsatisfactory set of arguments given by the Court to support it. It is obvious that the Court is well aware of its influential role in this case both on the national and on the international level. This conclusion may be derived first from the text, where the Court emphasizes the justiciability of the case.[113] Second, it may be deduced from surrounding circumstances, such as the fact that Barak chose this decision to mark the end of his Supreme Court career, with all this implies, and the translation of the decision into English, reflecting the Court's awareness of its international implications. In contrast to the significance of the decision, as the Court itself so clearly emphasized, the lack of analytic criteria and comprehensive arguments to support them is conspicuous and, in fact, detracts from the decision's precedential and guiding value, which the Court clearly intended it to have.

As noted above, the danger resulting from unclear criteria is lack of sufficient guidance to the operative authorities that would, at best, be puzzled when trying to make the right decision; however, in the worst case scenario, they may believe that the decision is left to their own discretion. Another important problem caused by the lack of analytic rationale

[113] The Court's decision, *supra* note 1, at paras. 47-54 of, discussing the justiciability of the question posed to the Court in the petition.

for determining the questions of direct participation in hostilities is that both the petitioners and the respondents may claim that the determinations of the Court support their own positions. This may result in repeatedly dragging both sides to the Court for the review of each and every operation of targeted killing, albeit after the fact. Should the Court decide that some of these later petitions are justiciable, it may be given an opportunity to revise its rationale and come up with comprehensive justifications that could contribute much more to the international attempt to clarify the questions of direct participation in hostilities.